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*Katherine Glenn*  
BY: \_\_\_\_\_

Larry A. Hammond, 004049  
Anne M. Chapman, 025965  
OSBORN MALEDON, P.A.  
2929 N. Central Avenue, 21st Floor  
Phoenix, Arizona 85012-2793  
(602) 640-9000  
lhammond@omlaw.com  
achapman@omlaw.com

John M. Sears, 005617  
P.O. Box 4080  
Prescott, Arizona 86302  
(928) 778-5208  
John.Sears@azbar.org

Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,	)	No. P1300CR20081339
	)	
Plaintiff,	)	Div. 6
	)	
vs.	)	<b>MOTION FOR ADDITIONAL</b>
	)	<b>PEREMPTORY STRIKES</b>
STEVEN CARROLL DEMOCKER,	)	
	)	
Defendant.	)	
	)	
	)	
	)	(Expedited Oral Argument
	)	Requested)

Defendant, Steven DeMocker, by and through undersigned counsel, hereby moves this Court to grant him three additional peremptory strikes, given the Court's decision to sit six alternate jurors in this death penalty trial. This motion is based upon Mr. DeMocker's rights to due process, equal protection, counsel, a fair trial and appeal, freedom from double jeopardy, and freedom from cruel and unusual punishment under

1 the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States  
2 Constitution and under the Arizona Constitution, Article 2, Sections 1, 2, 3, 4, 8, 10, 11,  
3 13, 15, 24, 32 and 33, as well as the authorities cited in the following Memorandum of  
4 Points and Authorities.

5  
6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 The United States Supreme Court has recognized that the primary purpose of  
8 peremptory challenges is to help “secure the constitutional guarantee of trial by an  
9 impartial jury.” *United States v. Martinez-Salazar*, 528 U.S. 304, 316, 120 S.Ct. 774,  
10 145 L.Ed.2d 792 (2000). Although peremptory challenges are not constitutionally  
11 mandated, they have been described as auxiliary to the Sixth Amendment right to an  
12 impartial jury. *United States v. Delgado*, 350 F.3d 520, 524 (6th Cir. 2003). They serve  
13 “to eliminate extremes of partiality on both sides” and “to assure the parties that the  
14 jurors before whom they try the case will decide on the basis of the evidence placed  
15 before them, and not otherwise.” *Swain v. Alabama*, 380 U.S. 202, 219 (1964). In fact,  
16 the right to peremptory challenges is “one of the most important of the rights secured to  
17 the accused.” *Pointer v. United States*, 151 U.S. 396, 408 (1894).

18 Because peremptory challenges are crucial to ensuring an impartial jury, many  
19 jurisdictions specifically provide for additional challenges when the court plans to seat  
20 alternate jurors. Federal Rule of Criminal Procedure 24 provides for three additional  
21 peremptory challenges where the court will empanel five or six alternates. The notes to  
22 the Federal Rule make clear that a court need not grant additional strikes to the  
23 government simply because it is granting additional strikes to the defense. The  
24 rationale, of course, is that the granting of additional strikes is to protect the defendant’s  
25 right to a fair trial. Many states have enacted similar laws providing additional  
26 peremptory challenges where alternate jurors are empanelled. *See e.g.* Haw. Rev. Stat.

1 Ann. § 635-29 (LexisNexis); 5/2-1106. 735 ILCS 5/2-1106 (Illinois); Tex. Crim. Proc.  
2 Code Ann. art. 35.15 (Vernon); 22-3412. Jury selection; peremptory challenges;  
3 swearing of jury; alternate or additional jurors, K.S.A. 22-3412 (Kansas); Trial Jurors,  
4 D.C. R. Crim. P. 24; Colo. R. Crim. P. 24; Md. R. Crim. P. 4-313. Ultimately, the  
5 discretion to grant additional peremptory strikes lies with the trial court. *Tamme v.*  
6 *Com*, 973 S.W.2d 13, 26 (Ken. 1998); *People v. Fort*, 618 N.E.2d 445, 311 (Ill. Ct.  
7 App. 1993).

8 Arizona's criminal rules do not address the issue of whether a trial court should  
9 grant additional peremptory challenges in cases such as this one where multiple  
10 alternates will be selected. However, Arizona Rule of Civil Procedure 47(f) provides a  
11 framework for additional peremptory strikes similar to that of Federal Rule of Criminal  
12 Procedure 24. Where five or six alternate jurors will be selected, Rule 47(f) mandates  
13 that three additional peremptory challenges will be permitted each side. The note to this  
14 rule states that Rule 47(f) was amended to for the purpose of conformity with Federal  
15 Rule of Criminal Procedure 24(c). Both rules provide a well-reasoned approach to  
16 peremptory challenges in situations where multiple alternates are necessary.  
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18 Furthermore, a "trial court has broad discretion in managing the conduct of a  
19 trial, and has a duty to properly exercise that discretion." *State v. Cornell*, 179 Ariz.  
20 314, 332, 878 P.2d 1352, 1370 (1994). In this case the Court has decided to seat six  
21 alternate jurors. The United States Constitution requires that "extraordinary measures  
22 [be taken] to insure that the [Accused] is afforded process that will guarantee, as much  
23 as is humanly possible, that [a sentence of death not be] imposed out of whim, passion,  
24 prejudice, or mistake." *Caldwell v. Mississippi*, 472 U.S. 320, 352 n.2 (1985) (quoting  
25 *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)). Indeed,  
26 "[t]ime and again the [Supreme] Court has condemned procedures in capital cases that  
27 might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383,  
28

1 393 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan,  
2 J., concurring in part and dissenting in part)). See also *Kyles v. Whitley*, 514 U.S. 419,  
3 422 (1995) (noting that the Court's "duty to search for constitutional error with  
4 painstaking care is never more exacting than it is in a capital case.") (quoting *Burger v.*  
5 *Kemp*, 483 U.S. 776, 785 (1987)). This elevated level of due process applies both to the  
6 guilt and penalty phases of the case. *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

7       Death qualification has been approved and validated as the method of seating a  
8 capital jury by this Court and others over the objection of the defense in this case.<sup>1</sup>  
9 *Witherspoon v. Illinois*, 391 U.S. 510, 517-518, 88 S.Ct. 1770, 1774-1775, 20 L.Ed.2d  
10 776 (1968). It has been evident during the first 6 days of jury selection that some  
11 number of jurors will likely survive the "cause" process whose views on the death  
12 penalty either remain unknown or are evolving. The length of the trial renders sensible  
13 the need for a pool of alternates, but in very large measure the length of the trial is  
14 dictated by the State's choice to call some 200 witnesses. Clearly, as the number of  
15 jurors to be seated increases because of the projected length of the trial, the risk also  
16 increases that jurors with impaired views of mitigation and the death penalty process  
17 will find their way on to panel. A small additional number of strikes would ameliorate,  
18 to some extent, that potential. For these reasons, the defense requests that this Court  
19 grant the defense three additional peremptory strikes for a total of thirteen.  
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23 <sup>1</sup> The process of death qualifications of jurors has been attacked repeatedly as a tool by which a skilled  
24 prosecutor can create a jury predisposed to convict and to impose the ultimate penalty. Sequin & Horowitz, *The*  
25 *Effects of "Death Qualification" on Juror and Jury Decisioning: An Analysis from Three Perspectives*, 8 L.  
26 *Psychology Rev.* 49 (1984); Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury*  
27 *Attitudes*, 8 *Law and Human Behavior* 53 (1984); Thompson, Cowan, Ellsworth & Harrington, *Death Penalty*  
28 *Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 *Law and Human Behavior* 95  
(1984). Some studies have suggested that the process of death qualification tends to bias remaining jurors toward  
the prosecution. E.g. Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification*  
*Process*, 8 *Law and Human Behavior* 121 (1984).

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**CONCLUSION**

The Court should grant Mr. DeMocker three additional peremptory strikes to protect his rights to due process, equal protection, counsel, a fair trial and appeal, freedom from double jeopardy, and freedom from cruel and unusual punishment under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under the Arizona Constitution, Article 2, Sections 1, 2, 3, 4, 8, 10, 11, 13, 15, 24, 32 and 33, and the authorities cited herein.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of May, 2010.

By: 

John M. Sears  
P.O. Box 4080  
Prescott, Arizona 86302

OSBORN MALEDON, P.A.  
Larry A. Hammond  
Anne M. Chapman  
2929 N. Central Avenue, Suite 2100  
Phoenix, Arizona 85012-2793

Attorneys for Defendant

**ORIGINAL** of the foregoing hand delivered for filing this 14<sup>th</sup> day of May, 2010, with:

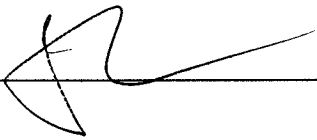
Jeanne Hicks  
Clerk of the Court  
Yavapai County Superior Court  
120 S. Cortez  
Prescott, AZ 86303

**COPIES** of the foregoing hand delivered this 14<sup>th</sup> day of May, 2010, to:

The Hon. Thomas B. Lindberg

1 Judge of the Superior Court  
2 Division Six  
3 120 S. Cortez  
4 Prescott, AZ 86303

4 Joseph C. Butner, Esq.  
5 Prescott Courthouse Box

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